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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. ----------

RALPH SHINABERRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,
acting through the County Production and
Marketing Administration Committee for
Hillsdale County, State of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, wherein that court affirmed the judgment of the United States District Court for the Western District of Michigan, dismissing the complaint for the reason that the United States had not consented to be sued.

OPINIONS BELOW.

The opinion of the United States District Court, Judge Kent (Appendix p. 6, *infra*), has [redacted] been reported. 142 F. Supp.
No printed opinion was rendered or filed in the United States Court of Appeals for the Sixth Circuit, Judges Simons, Martin and Stewart.

JURISDICTION.

The judgment of the Court of Appeals (p. 9, *infra*), is dated and was rendered March 6, 1947. This Court has jurisdiction to review upon certiorari under 28 U. S. C. Sec. 1254 (1) upon petition filed within ninety days prescribed by 28 U. S. C. Section 2101(c).

QUESTION PRESENTED.

Has the United States consented by the enactment of U. S. C. Title 28, Section 2410 to allow petitioner to bring an action in the United States District Court where he resides and where his property is situated, and this petitioner has alleged in his complaint that he is in possession of a quantity of wheat, and that the United States has asserted a lien upon said wheat under a federal statute which is in violation of the Fifth Amendment to the Constitution of the United States, and which Act of Congress has deprived the petitioner of the equal protection of the law, in violation of Article IV, Section 2, Clause 1, of the Constitution of the United States.

CONSTITUTION AND STATUTES INVOLVED.

Article IV, Section 2, provides that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law.

U. S. C. Title 7, Section 1330, sub-section 4, provides that until the processor on any farm stores or delivers to the Secretary of Agriculture or pays the penalty on the farm marketing excess on any crop of wheat, the entire crop of wheat shall be subject to a lien in favor of the United States for the amount of the penalty.

U. S. C. Title 7, Section 1330, sub-section 5, provides:

"The penalty upon corn or wheat stored shall be paid by the producer at the time and to the extent of any depletion in the amount of any commodity so stored, except depletion resulting from some cause beyond the control of the producer."

U. S. C. Title 7, Sections 1334-1335, 1339-1340 provide for the assessment of the penalty upon wheat.

STATEMENT OF CASE.

This is an action brought by a farmer against the United States of America acting through the County Production and Marketing Administration Committee in the United States District Court for the Western District of Michigan, Southern Division, to quiet his title to a quantity of wheat situated in said district against the penalty claimed by the United States for excess acreage.

Constitutional Right Claimed.

Petitioner claims that the entire wheat marketing Act is in violation of the Fifth Amendment to the Constitution of the United States in this,—that he is being deprived of his property without due process of law, and that he is being denied the equal protection of the law within the meaning of Article IV, Section 2, Clause 1, of the United States Constitution.

District Court's Ruling.

District Judge Kent, of the Western District of the State of Michigan, dismissed the complaint on motion, without trial, on the grounds,

"The United States of America had not given its consent to be sued." (Appendix, pp. 8-9, *infra.*)

Affirmed by Court of Appeals.

The Court of Appeals (Judges Simons, Martin and Stewart) accepted the ground on which the District Court dismissed, and affirmed the judgment of the District Court.

BASIS OF JURISDICTION BELOW.

The District Court's Jurisdiction was invoked to protect petitioner's claim to equal protection of the laws, and to prevent the deprivation of his property without due process of law, and to quiet title to his wheat against the purported lien of the United States for excess acreage, under Title 28 U. S. C., Sec. 2410.

REASONS FOR ALLOWANCE OF WRIT.

This case presents an important question of federal jurisdiction.

Judgment Below is in Conflict With This Court's Decision Sustaining Jurisdiction on Cases of This Type.

The government has been litigating with its citizens long before the enactment of Title 28, Section 2410. The leading case is

U. S. vs. Lee, 106 U. S. 196 (1882)

which is a case involving title to the National Cemetery at Arlington, Va. The question before the court is, should Title 28, Sec. 2410 have a narrow construction or should it have a liberal construction in order to accomplish its purpose?

While the statutory waiver of sovereign's immunity is to be strictly construed, congressional adoption of broad statutory language authorizing suits against the United

States is not to be thwarted by an unduly restrictive interpretation.

The case most directly in point on this question is,

Canadian Aviator vs. U. S., 324 U. S. 215, 89 L. ed. 901, 65 S. Ct. 639.

National City Bank vs. Republic of China, et al., Decided March 7, 1955, 348 U. S. 356, 75 S. Ct. 427.

We quote from the opinion:

"but even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time, it has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereigns immunity is found in such observations in unanimous opinions of this Court as to the peculiar rights and preferences due to the sovereign has changed."

Inasmuch as the Court did not pass upon the constitutionality of the sections from the Agricultural Adjustment Act, we have refrained from argument upon this topic.

CONCLUSION.

The writ should issue.

Respectfully submitted,

GEORGE A. MEEKISON,
Napoleon, Ohio,
Counsel for Petitioner.

April 12, 1957.

APPENDIX.

OPINION OF THE DISTRICT COURT.

(Filed June 27, 1956.)

Plaintiff has commenced this action in an effort to restrain the Government from collecting penalties for violation of the Acts of Congress fixing wheat quotas,[1] alleging that the same are unconstitutional.

The matter is before the Court on the Government's motion to dismiss plaintiff's complaint, first, because the complaint fails to state a claim against the defendant upon which relief can be granted; second, on the ground that the United States of America has not granted consent to be sued, and, third, because the Secretary of Agriculture is an indispensable party and has not been made a party.

Pursuant to statute[2] a three-judge court was convened because a constitutional question was involved and the Honorable Thomas F. McAllister, United States Circuit Judge, and the Honorable Raymond W. Starr, United States District Judge, were designated to sit with the writer by the Honorable Charles C. Simons, Chief Judge for the United States Court of Appeals for the Sixth Circuit. Oral arguments were had and briefs have been filed. For reasons which will hereinafter appear, the Court is satisfied that there is no basis for a three-judge court because it is not necessary to rule upon the constitutional question raised. *Oklahoma Gas & Electric Co., et al. v. Oklahoma Packing Company* (1933), 292 U. S. 396. *Osage Tribe of Indians v. Ickes, et al.*, 45 F. Supp. 179, Aff'd. 133 F. 2d 47, Cert. Den. 319 U. S. 750.

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[1] Agricultural Adjustment Act of 1938, 7 U. S. C. A. § 1281 *et seq.*

[2] 28 U. S. C. A. §§ 2282, 2284.

It is well settled that the United States cannot be sued without its consent and also that it need not provide a judicial remedy against itself. 1 *Cyc. Fed. Proc.* § 2.26; 1 *Barron & Holtzoff Fed. Prac. & Proc.* § 54, and cases therein cited.

During the hearing on the motion and in the briefs, the plaintiff, through his counsel, does not dispute this statement of law but rather contends that the United States has consented to this suit. Plaintiff cites in support of his position 28 U. S. C. § 2410, which in part reads as follows:

> "(a) Under the conditions prescribed in this section and section 1444 of this title, for the protection of the United States, the United States may be named a party in any civil action or suit in any District Court, including the District Court for the Territory of Alaska, or in any State Court having jurisdiction of the subject matter to quiet title to or for the foreclosure of a mortgage or other liens upon real or personal property on which the United States has or claims a mortgage or other lien."

Plaintiff claims that his action is in fact an action to quiet his title to the wheat which he has grown in excess of the quota provided under the statute. He claims that the United States has asserted a lien against such wheat and therefore this action is authorized by the quoted section of 28 U. S. C. § 2410.

A somewhat similar question was raised in *Viviano v. United States*, E. D. Mich. 1952, 105 F. Supp. 312, wherein the Court said at page 314:

> "Notwithstanding the original complaint in this case is labeled 'Petition to Quiet Title' based on Title 28 U. S. C. A. § 2410, the facts as established and the briefs presented in series prompt this Court to the conclusion that this petition was not commenced to

determine title but was in effect nothing more than a suit to enjoin the collection of taxes in deviation of procedure set forth by Congress with respect to refund of internal revenue taxes.

"That an action is captioned so as to bring it within the court's jurisdiction is not sufficient."

The statute under which the imposition of penalty could be made is Title 7 U. S. C. A. § 1340. Section 1372 provides for the collection of such penalty and also provides for a means of refund if the "penalty was erroneously, illegally, or wrongfully collected." Section 1376 makes provision for suit to collect such penalty, and Section 1340 (4) provides for a lien on the entire crop of wheat produced on a farm for the amount of the penalty for any excess grown. See *Blatner v. United States,* Pa. 1955, 127 F. Supp. 628, Aff'd Third Circuit 1955, 223 F. 2d 468.

This Court is satisfied that the provisions of 28 U. S. C. § 2410 were not intended to apply to a situation such as the plaintiff alleges in this case. Statutes granting consent to sue and thereby surrendering sovereign immunity must be literally and narrowly construed. *Wallace v. United States* (2 Cir.) 142 F. 2d 240; *Minnesota v. United States,* 305 U. S. 382; *United States v. Sherwood,* 312 U. S. 586.

Any doubts as to consent or jurisdiction of the Court should be resolved in favor of the United States. 1 *Cyc. Fed. Proc.* § 2.34 and cases therein cited.

The Court is satisfied that this action was not instituted for the purpose of quieting the title to the crop of wheat involved but was instituted for the purpose of restraining the Government from collecting a statutory penalty.

For the reasons herein stated the motion to dismiss must be granted for the reason that the United States has

not consented to be sued and the action is dismissed. An order may be entered accordingly.

W. WALLACE KENT,

Judge, United States District Court.

June 26, 1956.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 6, 1957.)

Before SIMONS, *Chief Judge*, MARTIN AND STEWART, *Circuit Judges.*

Without attempting to avail himself of the administrative remedies provided in the Agricultural Adjustment Act of 1938, as amended, 7 U. S. C. A., § 1281, *et seq.*, the appellant brought this action to restrain the United States from collecting penalties for violation of the statutes fixing wheat quotas, alleging that those statutes violated the Constitution.

It was the appellant's contention that the provisions of 28 U. S. C. A., § 2410 (a) conferred upon the district court jurisdiction to entertain the action. The court held that section of the Code inapplicable, concluded that the United States has not consented to be sued in an action such as this, and accordingly dismissed the complaint. 142 F. Supp. 413 (1956).

For the reasons stated in the district court's opinion, the order of dismissal is affirmed.

Approved for entry:

/s/ POTTER STEWART,

United States Circuit Judge.